

2009

# Resort Retainer, Zenith Insurance Co. v. Labor Commission of Utah, Donna E. Jones : Reply Brief

Utah Court of Appeals

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## Recommended Citation

Reply Brief, *Resort Retainers v. Labor Commission*, No. 20090668 (Utah Court of Appeals, 2009).  
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**IN THE UTAH COURT OF APPEALS**

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<b>RESORT RETAINERS and ZENITH INSURANCE CO.,</b>	:	Case No.: <b>20090668</b>
	:	
Petitioner/Appellants,	:	Labor Commission No.: 2002480
	:	
vs.	:	Priority 7
	:	
<b>LABOR COMMISSION OF UTAH and DONNA E. JONES,</b>	:	
	:	
Respondents/Appellees.	:	

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**REPLY BRIEF OF APPELLANTS**

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Appeal from the Utah Labor Commission

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FILED  
UTAH APPELLATE COURTS

JAN 20 2010

**PETITIONERS RESPECTFULLY REQUEST ORAL ARGUMENT  
AND THAT THIS CASE BE REPORTED.**

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**IN THE UTAH COURT OF APPEALS**

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## ARGUMENT

### **I. THE ALJ'S RULINGS WERE NOT SIMPLY DISCRETIONARY OR HARMLESS ERROR BUT CONSTITUTED A DENIAL OF DUE PROCESS AND FAIRNESS THAT SHOULD BE CORRECTED BY THIS COURT.**

Jones asserts that the ALJ's actions in this case, taken one by one, do not constitute an *abuse of discretion* and should therefore be affirmed by this Court. This approach sidesteps the true issue as framed by Zenith in its original brief - - whether Zenith's *due process rights* were violated by the ALJ's cumulative decisions which violated Zenith's right to a fair and balanced opportunity to prepare for and defend against Jones' claim and which resulted in significant prejudice and harm to Zenith.

"Due process challenges are questions of law that [the court] review[s] applying a correction of error standard." Color Country Management v. Labor Comm'n, 2001 UT App 370, ¶17. This Court's review of issues of due process and fairness is made with "no deference to the Commission's expertise." Bunnell v. Industrial Comm'n, 720 P.2d 1331 (Utah 1987).

This Court has declared that Labor Commission proceedings, while less formal and structured than traditional district court proceedings, nevertheless "must still satisfy basic notions of fairness." Color, id., ¶28. The Utah Supreme Court has repeatedly expressed - - while reviewing Commission proceedings - - that "[f]airness requires not only an absence of actual bias, but endeavors to prevent even the possibility of

unfairness.” Anderson v. Industrial Comm’n, 6967 P.2d 1219, 1221 (Utah 1985); Bunnell, id., at 1333 (concluding that “the manner in which the administrative law judge conducted this hearing was sufficiently unfair as to constitute a denial of plaintiff’s constitutional right to a fair hearing”).

Moreover, the Labor Commission has recognized that the Utah Administrative Procedures Act requires that “the parties to administrative adjudicatory proceedings must state the basis of their claims for agency action. See Utah Code Ann. § 63-46-3(3).” Winter v. Westcon Industries, 1996 UT Wrk. Comp. LEXIS 132. “While this requirement is liberally construed, fairness requires that a party disclose the underlying facts that support its claim. Each party has a right to obtain such information from other parties.” Id. (citing Utah Code Ann. § 63-46b-7 and Industrial Commission Rule R568-1-4.A). In Winter, the Commission declared that the claimant “has an obligation to provide the *medical information and other documentation on which his claim is based*. Without such information, the employer cannot respond and the ALJ cannot properly manage the hearing process.” Id. (emphasis added).

It is well-established that the employee, as the moving party in a workers compensation matter, has the burden of proof for her claim. At the time of the filing of a claim at the Labor Commission, the employee has the burden to produce supporting medical evidence, a medical release, and a list of medical providers. Utah Admin. Code R602-2-1(B) (1), (3). It is on this basis that the Labor Commission thereafter assigns the

responding party, the employer/carrier, the responsibility to collect and organize the medical records for a joint exhibit to be received at the time of the hearing. This process requires and presumes that the employee takes the *first* step - - that of satisfying her burden of proof to produce evidence in support of her claim. The employer/carrier is then given the opportunity to evaluate this evidence and to obtain reports which respond to this evidence.

Periodically, as the employer/carrier goes through this gathering process it becomes evident that a medical opinion supporting the employee's position has not been fully informed. Rather than incurring the costs and delays of obtaining an independent medical evaluation and referral to a medical panel for review, the employee/carrier may attempt to expedite the process by having the treating physician review the worker's full medical history, confirming or amending his or her opinion following the review. Moreover, during discovery the parties are allowed the opportunity to gather facts and evidence which may support or undermine the opposing party's evidence. Due process requires that the parties be allowed this opportunity. This process allows notice of the evidence and an opportunity to respond *prior* to the hearing. This process also allows the parties, at the time of the hearing, to define clearly any medical dispute which may then be properly referred to a Labor Commission medical panel.

In the present case, on July 21, 2003, more than five months prior to the hearing, Jones' *treating* physician, Dr. Braun, concluded that Jones was "not a good surgical



candidate.” (R. at 261, MRE p. 64G.) At that point, Jones was obligated to obtain and produce a medical opinion which supported her claim for surgical treatment of her industrial injury. Zenith accordingly asked the ALJ to dismiss the case *without* prejudice since there was no present dispute. (R. at 19-21.) In response, on August 26, 2003, Jones asked the ALJ for “sixty days to determine what treatment, if any, is recommended.” (R. at 22.) The ALJ set the case for hearing, presuming that Jones would produce supporting medical evidence.

The sixty days requested by Jones came and went without the production of any medical evidence supporting her claim for surgical treatment. Based upon Jones’ failure to produce any medical evidence in support of her claim, the ALJ could have properly dismissed the claim without prejudice based upon Zenith’s pending motion. On November 12, 2003, two months prior to the scheduled hearing, Zenith sent discovery to Jones, specifically asking for her to identify whether, in fact, a medical dispute existed and what medical evidence Jones would rely on to support her claim for further medical treatment. Again, there was no response from Jones.<sup>1</sup>

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<sup>1</sup>Although Jones’ counsel claims to have called and left a message for Zenith’s counsel concerning an evaluation with Dr. Hood, there is no evidence of this claimed notice. Moreover, a simple phone call - - if it occurred - - does not and should not relieve a party of the duty to timely produce critical evidence, particularly when there have been repeated, specific requests for this evidence by the opposing party.

In early December 2003, four weeks prior to the hearing, Jones was obligated by Commission rule to produce to Zenith any medical evidence which she wanted included in the medical record exhibit. Again, nothing was produced by Jones.

Because a hearing had previously been held in this case on another issue, Zenith had already submitted the Medical Record Exhibit to the Labor Commission. In late December 2003, Zenith supplemented the exhibit with additional records collected since the first hearing. The collection and submission of the supplemental records for the Medical Record Exhibit was based on the physicians identified by Jones in her list of medical providers and any other *known* medical providers. At no time, did Jones ever notify Zenith's counsel of a new medical provider, including Dr. Hood, or supplement her list of medical providers.

It is disingenuous for Jones' counsel to claim excuse, surprise, and delay for the production of Dr. Hood's report due to Zenith's failure to include it in the supplement to the Medical Record Exhibit, which was admittedly filed a few days late. Jones argues that the Commission rule to produce the Hood report did not apply because it was not "*in the Employee's possession.*" (Appellee Brief at p. 26.) Whether or not this allegation may be true, Jones clearly could and should have obtained this key evidence by this time. In essence, Jones argues that even though she had repeatedly failed to advise the Commission and Zenith of "what treatment, if any, is recommended" as she proposed in her August 26, 2003 letter, Zenith – the defending party – nevertheless became

responsible for gathering and submitting *her* critical medical evidence because she allegedly left a phone message that Jones was going to see Dr. Hood. It was clearly an error for the ALJ to accept this excuse for Jones' failure to timely produce her key medical evidence.

At the time of the hearing, Zenith objected to the admission of Dr. Hood's report as untimely and a surprise. Because the report was produced only one business day prior to the hearing, Zenith had no opportunity to review or respond to it. Zenith asked the ALJ for this opportunity, expressing concern that it did not appear from the report that Dr. Hood had been provided with Jones' full medical history. (R. at 262, Hearing Transcript pp. 55-56.) The record confirms Zenith's concern and reflects that Jones' failure to properly disclose her prior medical history and medical providers to Dr. Hood undermined the validity of his initial report.<sup>2</sup> (R. at 55-63, 81-82.)

While it may be appropriate, under some circumstances, to allow the admission of late-produced medical evidence, see, e.g., Decker v. Costco, 2009 Ut Wrk Comp. LEXIS 78, it is a violation of due process and fairness to refuse the opposing party an opportunity

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<sup>2</sup>Dr. Hood's second report clearly states the basis of his reversal of opinion. He states, "You are indeed correct that many of Ms. Jones' prior medical records and her consultations with other physicians were not available to me. She made no mention of having seen Dr. John Braun, Dr. Gerald Moress, Dr. George Mooney, or Dr. John MacFarlane. . . . The findings of Dr. Braun and Dr. Mooney are very important in determining a proper course of treatment. Had I had their opinions available at the time of her consultation on November 19, 2003, I would not have recommended surgical intervention because of the low likelihood that it would significantly improve her condition." Jones' assertion that "the record fails to reflect what other biased input may have been provided to Dr. Hood" (Appellee Brief at p. 29) has no basis in fact and is an inappropriate insinuation.

investigate and respond to the new evidence.<sup>3</sup> This is not a case in which the decision was simply harmless error. It is not a case in which the ALJ would have appointed a medical panel in any event - - that even without the admission of the late produced medical evidence there would have been some basis for referral to a medical panel. See, e.g., Basso v. Koret of California, Case No. 200117, 20011243, 2001952 (April 7, 2005) (a copy of this opinion is included in the addendum to Zenith's primary brief). Rather, the *only* reason that the case was sent to the medical panel by Judge Hann was the admission of the late-produced report from Dr. Hood and the ALJ's refusal to allow Zenith an opportunity to respond to the report. Had the ALJ left the record open, Dr. Hood's second report would have demonstrated that the first report was fatally flawed and there was no evidence supporting Jones' claim for surgery.

This is not a case in which the employee has been denied an opportunity to obtain a medical opinion from a provider of her choice. The medical opinions *opposing* Jones'

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<sup>3</sup>In fact, in the present case, the Commission's Order of Remand of October 31, 2005 expressed, "While the law allows latitude as to the type of evidence that can be considered in workers compensation proceedings, this latitude does not override constitutional and statutory due process requirements." (R. at 179.) It was on this basis that the Commission reversed Judge Lima's order of April 14, 2005 and remanded the case in order for the ALJ to address the issue of admission of Dr. Hood's second report and allow rebuttal evidence from Jones.

Zenith submits that, while the Commission's concern for due process is appropriate, it was misplaced under the history of this claim. Dr. Hood's second report was properly submitted pursuant to Commission rules as a part of Zenith's objection to the Medical Panel Report. Jones had an opportunity to respond to Dr. Hood's second report at that time. Jones failed to provide any response or competing opinion at that time or any time thereafter. It was therefore unnecessary for the Labor Commission to remand the matter on this basis.

claim for surgery come primarily from her own treating physicians - - Dr. Braun, Dr. Mooney, and Dr. Hood.<sup>4</sup> The combination of the ALJ's rulings effectively allowed Jones to satisfy her burden of proof by obtaining evidence from the Labor Commission medical panel. The Panel's opinion is the *only* medical evidence in the record to support her claim for surgical treatment. None of the treating or reviewing physicians support Jones' position.<sup>5</sup> Consequently, the Panel did not act as a reviewing body - - evaluating the competing opinions - - but became the sole source for Jones' evidence. Without the referral to the medical panel, Jones would not have satisfied her burden of proof. Without the refusal by the ALJ to allow Zenith an opportunity to respond to the untimely Hood report, Jones would not have been able to satisfy her burden of proof. Zenith was clearly

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<sup>4</sup>Jones repeatedly argues that Zenith improperly contacted the physicians, providing them with "biased" information. The only information provided to the physicians were Jones' prior medical records and a surveillance video - - the viewing of which speaks for itself as an unaltered observation by a camera. The interpretation of this video is the subject of much debate in this appeal. Unfortunately, the ALJ failed to make appropriate factual findings concerning the surveillance video and Jones' explanation. In fact, the ALJ failed to even mention the testimony provided by Zenith's witness on the matter.

Dr. Braun had already observed inconsistencies in Jones' behavior, and the video was simply provided to him at the time of a regularly scheduled appointment. He spent considerable time reviewing the video with Jones and was therefore informed of her "factors of import". (See Appellee's Brief at p. 16.) Similarly, Dr. Hood was aware of this information as it was addressed in Dr. Braun's records.

<sup>5</sup>Although Jones claims to have a physician who agrees with the panel and is ready to perform surgery, the information that this anonymous physician has been provided remains a closely held secret. Jones should have provided a report from this physician in 2005, when the second ALJ re-opened the record to allow rebuttal evidence to Dr. Hood's report. At least, at that point, there would have been *some* medical evidence produced by Jones in support of her claim.

harmed and prejudiced by the ALJ's rulings and the Commission's decision to affirm the ALJ's actions.

**II. THE ALJ'S FAILURE TO FOLLOW COMMISSION RULES AND HER REFUSAL TO ALLOW ZENITH AN OPPORTUNITY TO RESPOND TO SURPRISE EVIDENCE WAS NOT "REASONABLE AND RATIONAL".**

Even assuming, for the purpose of argument, that the intermediate standard of review applies to this matter, the evidence demonstrates that the ALJ's failure to follow Commission rules and her refusal to allow Zenith an opportunity to respond was not a reasonable and rational conclusion, resulting in significant prejudice and harm to Zenith.

As outlined in the argument above, Jones had the duty and obligation to timely produce medical evidence in support of her claim. Jones made affirmative representations that such evidence would be provided, asking for a 60-day period in which to supply a medical opinion addressing medical treatment. This period passed without any information forthcoming from Jones. Zenith then followed-up with specific requests to identify what medical evidence Jones would rely on to contradict the opinion of her own treating physician that surgery was not appropriate. No report was produced. Finally, when Zenith prepared a supplement to the Medical Record Exhibit, a collection of evidence supplied by Jones as well as records gathered by Zenith based upon Jones' list of medical providers, there was, again, no medical evidence supporting Jones' claim.

Surprise evidence was supplied by Jones only one business day prior to the hearing, which the ALJ allowed based upon the unsubstantiated excuse asserted by Jones' attorney that she had left a phone message with Zenith's counsel, mentioning that Jones was going to see Dr. Hood.<sup>6</sup> No written notice was provided. No response was provided to Zenith's repeated requests for information. Nevertheless, the ALJ accepted Jones' excuse and allowed the report to be admitted into evidence, concluding that Zenith should have gathered Jones' report for her on the strength of the purported phone message.

While exceptions may be allowed at times for the admission of untimely produced medical evidence, it was unreasonable and irrational for the ALJ to deny Zenith any opportunity to respond to the newly produced evidence. Zenith's request - - to confirm that Dr. Hood was *aware* of Jones' treatment with Dr. Braun and Dr. Mooney and had been was informed of their opinions - - was reasonable and appropriate as evidenced by Dr. Hood's second report in which he deemed this information "very important in determining a proper course of treatment." The ALJ's denial of Zenith's request was unreasonable and an abuse of her discretion.

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<sup>6</sup>Counsel for Zenith maintains that no such message was ever left for him. Counsel for Zenith was denied permission by the ALJ to ask counsel for Jones the date on which the message was left and the name of the person with whom it was left.

### **III. THE ALJ'S RULINGS AND INITIAL MEDICAL PANEL REFERRAL WERE NOT HARMLESS ERROR.**

By the time the case was sent back to the Medical Panel for a second review, the prejudice and harm were set and would affect all subsequent decisions. The Panel's opinion had been set and its opinion resolved at the time of the first evaluation. This fact is seen by a review of the Panel's two reports, the first of which quotes extensively from Dr. Hood's first report and the second of which makes *no mention* whatsoever of Dr. Hood's subsequent report and opinion. The Panel's opinion was further influenced by the credibility assessment it made during the first evaluation. This assessment by the Panel was beyond the scope of its authority and was influenced by the ALJ's failure to make adequate factual findings concerning the surveillance video and the rebuttal testimony. While Jones was able to provide her own version of the events to the Panel, the ALJ's failure to even acknowledge the witness testimony Zenith presented at the hearing - - concerning the second day of video surveillance - - resulted in an incomplete presentation of the case at the time of the Panel's review.

Additionally, the Panel's second evaluation was made after a three year gap in the medical history and records. There was no update of the medical records exhibit and no collection of any recent treatment records or notes. Rather, the only additional information the Panel received after three years was Jones' personal presentation at the examination. While Jones had failed to make any progress with the surgical pre-



conditions the Panel had suggested three years earlier, she nevertheless continued to seek a surgical solution.

The Panel's recommendation for surgery, with several caveats and pre-surgical requirements, coupled with Jones' refusal to disclose the identity of her new treating physician, has left Zenith no recourse but to seek ongoing review of this case. While Jones claims to have a treating surgeon ready and willing to oversee, guide and provide pre-surgical and surgical treatment, this provider remains anonymous. The history of this claim reflects that Jones has not always been completely forthright with her medical providers. Moreover, as Dr. Hood's second report reflects, it is essential and critical for treating medical providers to have a full and complete knowledge and history in order to form appropriate and correct decisions concerning medical care. Zenith, as the party assessed with the obligation to oversee and adjust the claim, asserts that it is reasonable and appropriate to ensure that treating physicians have been provided with this critical information. This is particularly true when a patient is requesting invasive treatment such as major back surgery. Zenith submits that it is unreasonable and irrational to order payment of medical treatment, particularly surgery and the possible aftermath of a failed procedure, when Jones has refused to provide even the name of the medical provider.

Jones' excuse for refusing to provide this information is the allegation that Zenith has improperly influenced her prior medical providers by providing them with her full medical history. Notably, the legal opinions cited by Jones, *Barbato* and *Goates*, pre-

date the events of this case and involve circumstances significantly different from that of a workers compensation claim. The cases cited by Jones involve the question of physician- patient privilege in the context of a civil case (i.e., a personal injury action and divorce proceedings). In contrast, in the workers compensation arena the employee's right to medical benefits is subject to particular standards and procedures unique to workers compensation law. Even with the endorsement of a Commission order, Jones does not, in effect, have a blank check to proceed with medical care.

**IV. IT IS ERROR TO PERMIT JONES TO UNDERGO MAJOR BACK SURGERY WITHOUT PERMITTING ZENITH TO PROVIDE THE UNKNOWN TREATING PHYSICIAN A COPY OF JONES' FULL MEDICAL HISTORY.**

The courts have long recognized that workers compensation claims are subject to the continuing jurisdiction of the Labor Commission because an injured worker's medical condition is subject to change and development. Hardy v. Industrial Comm'n, 89 Utah 561, 58 P.2d 15 (1936). In the present case, there have been long delays in adjudication of Jones' claim for surgical treatment. Due to the years that it has taken to have issues in this case reviewed, Zenith appropriately requested, after the last order issued by the Commission, that the matter be remanded to obtain updated medical records and information relevant to Jones' current physical status. Presently, the Commission's record contains medical opinions from treating physicians that are more than five years old. The only additional information the Commission and Zenith have are the Medical

Panel's report and Dr. Stadler's evaluation - - which raised questions concerning Jones' recent activity level.

Zenith submits that it would be reasonable to gather the additional medical records, particularly the records from the unknown medical provider who Jones asserts is ready and willing to perform surgery. In contrast, Jones asserts that the Commission's denial of this request is reasonable and not an abuse of discretion.

The result is that, while Jones has reportedly continued to receive medical care with a undisclosed medical provider, Zenith has been denied any opportunity to know what this treatment has been, what efforts Jones has made to improve her physical condition in preparation for surgery (per the Panel's recommendations), and what changes, if any, Jones has had with her condition. This result may be unique in how claims are typically managed and adjudicated. It is far more reasonable to make decisions based upon complete and *current* medical information.

At several junctions, Zenith has attempted to get this case back on track. Unfortunately, the delays and lack of disclosure have resulted in positions being hardened. As it stands under the Commission's current order, Jones may proceed with surgery as advised by the Panel with an undisclosed, anonymous medical provider. Zenith opposes this position in light of the fact that all prior *treating* physicians have opined that Jones is not an appropriate surgical candidate, that Jones' present anonymous physician has not reviewed Jones' medical records or the opinions of her prior treating

physicians, and that Jones, based upon the opinions of her prior treating physicians, is not likely to improve her condition with surgery. Zenith submits that the Commission's ruling is an error that this Court should not allow. It is an unreasonable and irrational conclusion to a case which has reached this point because Commission rules and standards have been disregarded and because Jones has been allowed to improperly satisfy her burden of proof by obtaining her only supporting medical opinion by an erroneous medical panel referral. The case should be reversed and remanded to the Commission with an Order that the surgery is denied unless and until she shows some change in condition and provides a proper medical opinion supporting additional medical treatment as related to her industrial injury.

### **CONCLUSION**

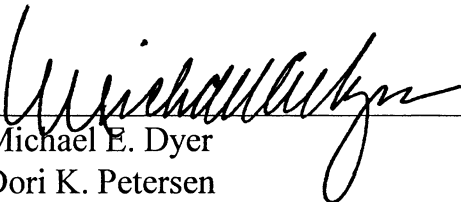
The ALJ's rulings in this case were not simply an abuse of discretion but constituted a denial of due process and fairness which should be corrected by this Court. The ALJ's repeated failure to follow Commission rules and her refusal to allow Zenith any opportunity to respond to surprise evidence was not reasonable and rational. The ALJ's rulings and her referral to the medical panel were not simply harmless error. Rather, these rulings were critical errors which resulted in significant prejudice to Zenith. They cannot and should not be viewed as merely inconsequential discretionary rulings. The Court of Appeals should reverse the Appeals Board's Order and remand this case

with the instruction that the Medical Panel's report be excluded and an order entered denying Jones' request for surgical treatment.

It would be a serious error to permit Jones to proceed with major back surgery without permitting Zenith to provide the anonymous treating surgeon with a full copy of Jones' medical history. At a minimum, this Court's ruling should ensure that this critical information is known by the new treating physician - - given that all prior *treating* physicians have concluded that Jones is not an appropriate surgical candidate.

Respectfully submitted this 20<sup>th</sup> day of January, 2010.

BLACKBURN & STOLL, LC

A handwritten signature in black ink, appearing to read "Michael E. Dyer", is written over a horizontal line.

Michael E. Dyer

Dori K. Petersen

Attorneys for Appellants Resort Retailers and/or  
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CERTIFICATE OF SERVICE


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